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IN THE

Supreme Court of the United States

..... TERM, 1940.

No. 263.

GENEVIEVE P. ST. MARIE and Seventeen (17) Others,
Petitioners,

vs.

THE UNITED STATES OF AMERICA, Trustee, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI AND SUGGESTIONS AND AUTHORITY IN SUPPORT THEREOF.

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Parker & Baird Company, Law Printers, Los Angeles.

SUBJECT INDEX.

PAGE

Petition for Writ of Certiorari and Suggestions and Authority in Support Thereof 1

Prayer 1

Suggestions and Authority in Support of the Application for Writ of Certiorari 5

The Decree 5

Question Presented 6

Statement of Facts 7

The Trial Court 11

Circuit Court of Appeals 14

Conclusion 18

The Prayer Renewed 18

Certificate of Counsel 19

TABLE OF AUTHORITIES CITED.

CASES. **PAGE**

United States v. Jackson, 280 U. S. 183..... 15

STATUTES.

Act of February 8, 1887, 24 Stat. 388.....7, 10, 14

Act of February 14, 1923, 42 Stat. 1246..... 7

Act of March 2, 1917, 39 Stat. 969, Sec. 3.....3, 6, 7, 17

Act of March 2, 1917, Ch. 146, 39 Stat. 969..... 6

Act of June 25, 1910, 36 Stat. 855..... 7

General Allotment of Law, Feb. 8, 1887, Ch. 119, 24 Stat. 388.... 2

Mission Indians Act of January 12, 1891, Chap. 65, 26 Stat. 712, Sec. 4.....2, 5, 7, 10, 11, 14

42 Statutes at Large 1246..... 10

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PETITION FOR WRIT OF CERTIORARI AND SUGGESTIONS AND AUTHORITY IN SUPPORT THEREOF.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Prayer.

The petitioners, Genevieve P. St. Marie and the seventeen (17) others, come here now and pray to this Honorable Court that a writ of certiorari may be issued to review the decree entered by the United States Court of Appeals in and for the Ninth Circuit in the above-entitled consolidated cases on February the 20th, 1940. And for cause your petitioners assign the following reasons:

1. In the year 1887 Congress adopted a policy to treat with the Indians as individuals, to prevail upon them to

abandon tribal relations, and consent to the division of their lands and to hold them in severalty.

2. With this policy in mind, Congress enacted the General Allotment Law of date February 8, 1887, Ch. 119, 24 Stat. 388, providing for the allotment of lands to the Indians in severalty.

3. Every amendment to the General Act that has ever been made by Congress was to further the purpose of extending all possible benefits to the Indians.

4. In 1891, in order to provide for the specific needs of the Mission Indians of California, Congress passed the Act of January 12, 1891, Ch. 65, Stat. 712. The particular purpose of this Act was to benefit the Mission Indians in California and to allot them lands in severalty.

5. Subsequently, Congress was convinced that the most acceptable disposition of the lands for the benefit and welfare of the Mission Indians was not being met and their best interests were not being conserved. To remedy this condition and to further benefit the Indians, the Act of March 2, 1917 was passed.

6. To carry forward the purpose of Congress, a provision, with others, was made as follows:

> "That the Secretary of the Interior be and he is hereby *authorized* and *directed* to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian reservations in the State of California."

7. The trial court held that the Secretary of the Interior could, in his discretion, withhold his approval of your petitioners' allotments and thereby deprive them of their trust patents and defeat their rights to their land in

severalty. This was error that caused your petitioners great damage.

8. The trial court held that the allotments could not become, in any way, effective until approved by the Secretary of the Interior. This was an error that caused your petitioners great damage.

9. The United States Circuit Court of Appeals for the Ninth Circuit affirmed the findings and the decree of the trial court. This was an error that caused your petitioners great damage.

10. The Court of Appeals held there were two possible constructions of the provision set out in paragraph eight herein. This was an error, but were it possible for this to be true, then the construction should have been given that would meet the purpose of Congress and conform to the decisions of this Court and afford protection to the property and the rights of your petitioners.

11. It was an error for the Circuit Court of Appeals to indicate the value of the lands selected could, in any way, affect the rights of the petitioners under the provisions of the allotment laws or to prevent or delay approval of the allotments.

12. The Court of Appeals was in error when it refused to give expression to the full, fair and apparent intention of Congress as set forth in Sec. 3, Act of March 2, 1917, 39 Stat. 969.

13. The qualifications of the petitioners to receive allotments of the lands they have long occupied and have long been possessed by their ancestors, are not now and never have been disputed.

14. The very purpose of the Mission Indian Act of January 12, 1891 was to allot these lands to the Mission Indians of California in severalty.

Your petitioners submit supervisory powers should be exercised in these cases; that the findings of the trial court and the affirmation of the findings and conclusions and the decree of the trial court by the Court of Appeals and the findings, conclusions and the decree of the Court of Appeals are at variance with the purpose of Congress, that they conflict with the policy of the United States Government, that they are not in harmony with the decisions of this Court, that they deprive your petitioners of their property and their rights.

Wherefore, it is respectfully submitted that this petition should be granted, and hence our prayer.

THOMAS L. SLOAN,
Palm Springs, California,
Counsel for Petitioners.

WILLIAMSON S. SUMMERS,
216 Central Building,
Los Angeles, California,
Of Counsel.

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GENEVIEVE P. ST. MARIE and Seventeen (17) Others,
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THE UNITED STATES OF AMERICA, Trustee, *et al.*,
Respondents.

SUGGESTIONS AND AUTHORITY IN SUPPORT OF THE APPLICATION FOR WRIT OF CERTIORARI.

The Decree.

The trial court held that, in substance, the work of the agent making the allotments to the Palm Springs band of Mission Indians had to be approved by the Secretary of the Interior in order for it to become effective; that until this was done no allotments were made. It was as though nothing was done.

The Court of Appeals held the right of the Secretary of the Interior to determine when Indians were so advanced as to warrant allotments of lands in severalty is by no means settled; that it is not a closed question; that the Mission Indians Act of January 12, 1891, Chap. 65, 26 Stat. 712, for the relief of the Mission Indians provided, in Section 4, for the exercise of *discretion* by the

Secretary; that the Act of March 2, 1917, Section 3, said the Secretary is authorized and directed to cause the allotments to be made—but the Court said this is unconditional—did the Congress intend it to be so? Was all discretion taken from the Secretary, or could he still exercise discretion, but, when he exercised it, he was then directed to make the allotments?

Then the Court adds, since this is not a proceeding to compel action by the Secretary, it is not necessary to determine which is correct; therefore the trial court is affirmed.

Question Presented.

The allotments were made or they were not made; the allotting agent was duly appointed. Blanks were sent to him from Washington. He used them as sent. They evidently were printed at a time when the Act of January 12, 1891 was in force and the Secretary then had discretion, but when the Act of March 2, 1917, was passed all discretion was abrogated and a positive direction was the purpose and the feature of the new law.

The blank forms delivered to the allotting agent were used by him in making allotments and a provision was in them, in substance, "not valid unless approved by the Secretary of the Interior," but all of petitioners' allotments were made subsequent to the Act of March 2, 1917.

The question is: Can an abrogated provision in an allotment blank set at naught the solemn mandate of Congress?

> "The Secretary of the Interior is hereby *authorized* and *directed* to cause the allotments to be made."
>
> Act March 2, 1917, c. 146, 39 Stat. 969.

Was it the duty of the Secretary to cause the allotments to be made? Had the Secretary any discretion? Could he withhold approval and, by so doing, defeat the allotments?

This is the question to be settled.

Statement of Facts.

These cases were brought by certain Indians of the Palm Springs band of Mission Indians of California. They were all qualified members of the band and made claim as allottees to certain lands within the Palm Springs Indian Reservation, based upon the following facts and circumstances:

On June 7, 1921, the Secretary of the Interior, acting under the authority of Congress, as set forth in the Acts of January 12, 1891, 26 Stat. 712; June 25, 1910, 36 Stat. 855; March 2, 1917, 39 Stat. 975, Section 3 and the Act of February 8, 1887, 24 Stat. 388, appointed H. E. Wadsworth special allotting agent at large to allot the Mission Indians of California, including the Palm Springs reservation, with instructions and directions to allot the lands of the reservation to the Indians entitled thereto.

Wadsworth accepted the appointment and qualified therefor as required by the law and entered upon the duties of his office on the first day of July, 1921.

Prior to the beginning of the work of allotting the lands upon the Palm Springs Reservation and surveying them, Congress passed the Act of February 14, 1923, 42 Stat. 1246, which directed that, unless otherwise provided, the provisions of the Act of Congress February 8, 1887, 24 Stat. 388, as amended, be extended to all lands heretofore or that may be hereafter purchased by

Congress for the use and benefit of any individual Indian band or tribe.

Thereafter, on June 1, 1923, the agent, Wadsworth, entered upon his work and allotted, surveyed and classified the lands of the Palm Springs Reservation, as shown by the allotments schedule of January 21, 1923, and May 9, 1927, Book of Maps, and a stipulation of facts, all included in Petitioners' Exhibits Nos. 1 and 5.

Fifty (50) individual allotments were made, scheduled, platted, surveyed and certificates of selection were issued to the allottees. The lands were surveyed and classified as "good" and "better" and "best" and alloted in tracts of forty (40) acres of "good", five (5) acres of "better" and two (2) acres of the "best" lands, making in all forty-seven (47) acres in each allotment.

At this time all the Indians of the band were living on Section Fourteen (14), Township Four (4), San Bernardino Meridian, in California. On this section were located the valuable mineral hot springs and other waters that were available and valuable for domestic purposes. For this reason only two (2) acres were allotted to each allottee on said section. The other forty-five (45) acres were allotted from other sections. Each of the fifty (50) allotments are shown on the schedule, with the descriptions and classifications of the lands allotted.

The certificate to the schedule of allotments is as follows:

"Palm Springs, California
June 21, 1927

This is to certify that listings of selections for the Indians of the Aqua Caliente (Palm Springs) Indian Reservation, California, began June 1, 1923, and the

same was completed on June 21, 1923, and it is further certified that the allotments shown herein were made in accordance with the provisions of the Act of Congress of February 8, 1887 (24 Stat. L. 388), as amended by the Act of June 25, 1910, 36 Stat. L. 855, and supplemented by the Act of March 2, 1917, 39 Stat. L. 969-76.

H. E. WADSWORTH,
Special Allotting Agent.

C. S. ELLIS,
Superintendent, Mission Indian Agency, California."

Another schedule of allotments was made by the same special allotting agent on the Palm Springs Reservation. There were twenty-four (24) individual allotments. The certificate attached to the second schedule is as follows:

"Palm Springs, California
May 9, 1927

This is to certify that listings of the allotment selections for the Indians of the Palm Springs (Aqua Caliente) Indian Reservation, California, began on June 1, 1923, and the same was completed on May 9, 1927, and that it is further certified that the allotments shown herein were made in accordance with the provisions of the Act of Congress of February 8, 1887 (24 Stat. L. 855), and supplemented by the Act of March 2, 1917, 39 Stat. L. 969-76.

H. E. WADSWORTH,
Special Allotting Agent."

The allotments on the 1923 schedule were not all voluntary selections made by the allottees. Notices were posted

by the agent that arbitrary allotments would be made to those who did not appear and make their selections, and that was done.

Homesite lands selected, improved and occupied by Indian members of the Palm Springs band of Mission Indians were disregarded by the agent and the lands were set apart and held as the Hot Springs Reserve.

The allotments were made in 1923 and 1927 and the law in force at that time and under which the allotments were made was the Act of February 8, 1887, 24 Stat. 388, as amended.

See 42 Stat. at L. 1246.

This provides that, unless otherwise specifically provided, the provisions of the Act of February 8, 1887, 24 Stat. 388, *as amended, shall govern.*

The lands of the Palm Springs Reservation were purchased and the reservation was established by the Act of January 12, 1891, 26 Stat. 712.

The Mission Indian Act was enacted for the benefit of the Mission Indians of California. It is known as the act for their relief. It was enacted January 12, 1891. The commission it created was charged with the duty of selecting lands for each band of the Indians. There were thirty (30) bands. If possible, the lands selected were to be in the actual possession of the bands. To the general satisfaction of all concerned the commission carried forward the purpose of Congress.

The issue here is: Have the rights to the lands in severalty been granted to the Palm Springs Indians? Have the allotments been made? The petitioners contend they have and that they are entitled to trust patents.

The Trial Court.

The trial court held, at page ten (10) of the opinion:

> "Denial of relief involves no injustice to any of them. They are charged with knowledge of the conditions under which the lands could be allotted. The selection certificate carried actual notice to each of them that the selection would not mature into an allotment unless approved by the Secretary. If the failure to recognize individual titles in certain members of the tribe results in an individual detriment, the tribe as a whole benefits. The lands remain tribal and, ultimately, even the individual claimants benefit by communal control."

Coming from a Chancellor of the United States Court to the wards of the United States Government, this is a pronouncement with a refrigerator temperature, even though it is the law; but, if it is not the law, it could well be designated the refinement of cruelty.

Have in mind the Mission Indian Act of date January 12, 1891, enacted for the relief of the Mission Indians. There Congress gave the Secretary certain discretion. The Act of March 2, 1917, provides:

> "That the Secretary of the Interior be and he is *hereby authorized and directed* to cause allotments to be made to the Indians belonging to and having tribal rights on the Mission Indian Reservation."

Here Congress cancelled the discretion.

Wadsworth was the duly appointed, qualified and acting special allotting agent. In making the allotments he was acting officially. Here is a copy of the letter the

allottees received from him after the lands had been selected and allotted:

"Department of the Interior
Central States Indian Field Service

Coachella, California, April 22, 1927

Miss Anna J. Pierce,
Palm Springs, Calif.
Friend Anna:

I enclose to you herewith certificate covering the allotments just made to you on the Palm Springs Reservation. As I have done in Carrie's case, I included the 40-acre tract in the SE¼ of the SW¼ of Section 10, although it is not yet surveyed, as I think I explained to you yesterday. I am hoping, however, that I shall have another crew surveying this summer or fall and believe we can at that time come down and make these surveys.

I omitted to say in my note of today transmitting Carrie's certificate to her that it is difficult to tell exactly when you may expect these patents from Washington, but I believe they should be here within six weeks or so. They will come to the Superintendent in Riverside, who will notify you that they are there and ready for delivery to you. In the meantime the Commissioner of Indian Affairs in Washington authorizes me to say to you that from this date on you are entitled to enter upon and take possession of these allotments and these certificates will be your evidence of such authority until the trust patents are received by you. I feel certain that these lands will continue to increase in value and will serve as the beginning of a very comfortable competency for each one of you.

With regards and best wishes, I am

Your friend,

H. E. WADSWORTH,

United States Special Allotting Agent."

But the Court declares that the unlettered wards of the Government had actual notice that the selection would not mature into an allotment unless approved by the Secretary.

The petitioners say that is not the law. All discretion given the Secretary in the Mission Indian Act and never used by him except to the detriment of the Indians was annulled by the Act of March 2, 1917. No condition in any document left by oversight or put there by design can abrogate the solemn "directed" by Congress in the March 2, 1917, Act. The Secretary was acting under orders of Congress. He was *directed* to cause the allotments to be made. Wadsworth was the duly appointed allotting agent. He was acting for the Secretary. He had authority to make, and did make, the allotments.

Note the allotting agent's letter. He says:

> "The Commissioner of Indian Affairs in Washington authorizes me to say to you that from this date you are entitled to enter upon and take possession of these allotments and this certificate will be your evidence of such authority until the trust patents are received by you."

Well did Wadsworth know, when he wrote that letter, that the Secretary had no discretion—there was nothing for him to "approve".

Circuit Court of Appeals.

The Court of Appeals says, correctly, that the power to determine when allotments of lands in severalty should be made rested with the Secretary. This by reason of Section 4 of the Mission Indian Act. Then the Court says, on page 2 of the opinion, no attempt was made by the Secretary to allot any of the lands and Congress passed the Act of March 2, 1917, and in Section 3 of that Act the Secretary was *authorized* and *directed* to cause the allotments to be made. This is also, in substance, correct.

The Court then proceeds to say there are two possible constructions of that provision. It *might* mean Congress had made the determination the Mission Indians were sufficiently advanced to warrant the allotments and unequivocally *directed* the Secretary to make them. On the other hand, it *might* mean the Secretary must still exercise his discretion and, having done so, *must then make* the allotments. The Court adds this being not a proceeding to compel action by the Secretary, it is not necessary to determine which meaning is correct. Then the Court affirms the trial court.

The Court said there are two possible constructions of that provision.

Let us find out, if we can, what Congress had in mind when it enacted the allotment laws. The first was February 8, 1887, and is Chap. 119, 24 Stat. 388.

The purpose was to provide for the allotment of lands in severalty to Indians on various Indian reservations. It has been amended several times. The amendments were made for the purpose of extending the benefits of the General Act. The General Act marks the date on

which Congress determined to deal with the Indians as individuals. It was the date on which Congress adopted a policy to prevail upon the Indians to get away from tribal relations, to consent to the division of their lands, to hold them in severalty. The policy is expressed in the case of the *United States v. Jackson,* 280 U. S. 183, at pages 196-7. There the Court said:

> "We find that the Indian Homestead Act of February 8, 1887, with various amendments, constitutes a single system of evidencing a continuous purpose on the part of Congress. The statutes are in *pari materia* and they *must* be so construed. It cannot be supposed that Congress in any part of this legislation, all of which is directed toward the benefit and the protection of the Indians, as such, intended to exclude from the beneficient policy which each Act evidences an Indian claiming under the Homestead Act. Even the statute uses the term allottee. If there were doubt on the question, the silence of Congress, in the face of long-continued practice of the Department of the Interior in construing statutes which refer only to Indian allottees or Indian allotments as applicable also to Indians claiming under homestead laws, must be considered as equivalent to consent to continue the practice until revoked by Congress."

If to the provision there are two possible constructions in the mind of the Court of Appeals, would it not have been wise to follow the *highway,* paved by the decisions of this Court, that leads *up* to the policy adopted by Congress to protect the wards of the Government in property that is of great value and in rights that are invaluable, rather than to take the *byway* that leads *down* to uncertainty?

This Court has repeatedly held that all laws affecting the rights of Indians must be liberally construed in their favor. Congress expressed by legislation a desire to benefit the Mission Indian. It wanted him to have shoes instead of moccasins, to have a blanket on his bed and a coat on his back. It wanted him to fold up his tent and put up a house. It wanted to show him how to cultivate the soil, to sow seed, to grow and harvest a crop. In short, Congress wanted to make him a citizen instead of holding him as a ward. With this in mind the Act of January 12, 1891, was passed. It was passed not to hinder, but to help. With this in mind Congress, with confidence in the Secretary, gave him authority and trusted him to exercise his discretion in using it. More than twenty-five (25) years passed, and no attempt to carry out the purpose of Congress, no allotments of the lands had been made. The Secretary had not cooperated with Congress. He was holding the Indians under tribal relations. With this policy the Indians were decreasing in numbers. They were pointed for extinction. These facts were put before Congress—the result was the Act of March 2, 1917. In this Act all discretion was taken from the Secretary and put over to the President. The Secretary was *directed* to cause the allotments of lands, and to cause trust patents to be delivered to the President, to be by him held free and clear of liens or encumbrance until such time, under the new statutes, as the Indians were deemed capable of protecting their own interests as members of society. In short, the purpose was not charity, it was to afford opportunity.

Let us sum up: Under the Mission Indian Act the Secretary had discretion, but "No attempt to allot any of the lands was made" (Opinion of Court, page 2).

Then Congress passed the Act of March 2, 1917, and took discretion from the Secretary and gave him directions as to what to do and how to do it.

It will be recalled there were thirty (30) Indian missions in California under the Mission Indian Act. The Secretary, after its passage and under the provisions of the March 2, 1917 Act, allotted more than one thousand (1000) Mission Indians and caused the trust patents to issue in all cases except down at Palm Springs.

> "Some of the selections have become valuable for use as a winter resort and as a result of considerable private expenditures. Neither the allotment schedules nor the certificates of selection have been approved by the Secretary of the Interior." (Opinion of Court, page 5; Dissenting Opinion, page 41.)

The trial court says:

> "The lands remain tribal, the individual claimants benefit by communal control."

The Court of Appeals "affirms" the trial court.

This decision antagonizes the policy promulgated by the Acts of Congress.

> "The very purpose of the law was to allot the lands to the Indians in severalty." (Dissenting Opinion, page 23.)

The qualifications of these Indians and their ordinary right to receive allotments in these lands long occupied and possessed by their ancestors are not disputed.

Conclusion.

The petitioners submit this case is one calling for exercise of supervisory powers by this Court in order to clarify the law resulting from conflicting decisions and correct the findings that depart from the accepted and usual course of judicial proceedings and are so far at variance from the apparent intention of Congress that the petitioners are deprived of property of value and denied rights that are invaluable.

The Prayer Renewed.

The petitioners now renew their *prayer* that a *writ of certiorari* may issue and that the decree of the United States Circuit Court of Appeals for the Ninth Circuit in this cause may be reviewed and that, at the conclusion of the review, this Court will decline to affirm the said opinion and, instead, will adopt the dissenting opinion filed therein, to the end that petitioners' properties may be protected and petitioners' rights may be conserved.

Respectfully submitted,

THOMAS L. SLOAN,
Palm Springs, California,
Counsel for Petitioners.

WILLIAMSON S. SUMMERS,
216 Central Building,
Los Angeles, California,
Of Counsel.

Certificate of Counsel.

State of California, Los Angeles County—ss.

I, Williamson S. Summers, being first duly sworn according to law, do say upon oath that I am an attorney at law, admitted to practice before the Supreme Court of the United States; that I am one of the attorneys for the petitioners; that I prepared the foregoing petition in good faith and not for delay; that said petition in my opinion has merit and is well founded in law.

WILLIAMSON S. SUMMERS,

Subscribed in my presence and sworn to before me this ..... day of July, A. D. 1940.

.....

Notary Public.

My commission expires ..... day of ....., 1940.

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 263

GENEVIEVE P. ST. MARIE AND SEVENTEEN (17) OTHERS, PETITIONERS

v.

UNITED STATES OF AMERICA, TRUSTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The judgment of the circuit court of appeals was entered January 3, 1940 (R. IV, p. 53). A petition for rehearing was denied February 20, 1940 (R. IV, p. 54). On May 11, 1940, a Justice of this Court made an order which extended the time for applying for a writ of certiorari to July 19, 1940. The petition was not filed until July 20, 1940. It was consequently not filed until after the expiration of the three-months' period and the sixty-day extension permitted by section 8 (a) of the Act of February 13, 1925, c. 229, 43 Stat. 936,

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940, 28 U. S. C., section 350. The petition is accordingly out of time and should, we respectfully submit, be either denied or dismissed for want of jurisdiction.

FRANCIS BIDDLE,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

AUGUST 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940